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Supreme Court of the United States

October Term, 1957

No. 655

DONG WING OTT and DONG WING HAN,
Petitioners,

against

EDWARD J. SHAUGHNESSY, District Director, Immigration and Naturalization Service, New York District,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ELMER FRIED,
Attorney for Petitioners,
37 Wall Street,
New York 5, N. Y.

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Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition of Dong Wing Ott and Dong Wing Han respectfully shows to this Court and alleges:

Opinion Below

First: The opinion of the United States Court of Appeals for the Second Circuit is reported in 245 F. 2d 875.

Second: The order sought to be reviewed was made and entered July 5, 1957. An order granting rehearing and reaffirming this decision on rehearing was made and entered on September 11, 1957; the opinion is reported in 247 F. 2d 769. The decision of the District Court reviewed by the Court of Appeals is found in 142 Fed. Supp. 379.

Jurisdiction

Third: Jurisdiction to review in the manner sought herein is granted this Court by 28 U. S. C. Section 1254(1). Jurisdiction of the District Court is claimed under 8 U. S. C. Sections 2201 and 2202 and 5 U. S. C. Section 1001.

Questions Presented

Fourth: The questions presented for review are as follows: whether an alien applicant for admission to the United States, who has been ordered excluded from the United States and then who has been paroled into the United States pursuant to the authority contained in Section 212(d)(5) of the Immigration and Nationality Act (8 U. S. C. Section 1182(d)(5)) is, while in such status of parole, "within the United States" so as to empower the Attorney General to withhold his deportation under the authority of Section 243(h) of the Immigration and Nationality Act (8 U. S. C. Section 1253(h).

Statutes Involved

Fifth: The relevant sections are:

Section 243(h) of the Immigration and Nationality Act (8 U. S. C. Section 1253(h)):

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would subject to physical persecution and for such period of time as he deems to be necessary for such reason."

Section 212(d)(5) (8 U. S. C. Section 1182(d)(5)):

> "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons

or for reasons being strictly in the public interest, any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served, the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

Statement of the Case

Sixth: The material facts in this case are as follows: for the purpose of this action, the petitioners are deemed aliens under an order to be excluded and deported from the United States, but have been on shore in the United States under parole since October, 1954. The defendant seeks to deport them to China, and petitioners have claimed that they would be subject to persecution if deported to China. They filed applications for withholding of deportation under Section 243(h) of the Immigration and Nationality Act; such applications were rejected without consideration of the merits of the claim of persecution, upon the ground that they are not "within the United States" for the purposes of making such application.

Reasons for Allowing the Writ

Seventh: The basis for Federal jurisdiction is that the Federal Immigration authorities desire to take petitioners into custody and deport them from the United States without consideration of their applications for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, and thus, as petitioners contend, they are being deported in deprivation of a right furnished by said

Act. Action of the District Court was commenced for declaratory judgment and injunction.

Eighth: The allowance of the writ of certiorari is thought to be justified on the following grounds:

(a) This Court has issued a writ of certiorari to the 9th Circuit in the case of *Leng May Ma* v. *Barber*, 353 U. S. 981 (1957), presently pending, involving the same issue as the instant case. The reason that writ is nonetheless sought in the instant case is that, in previous term, when the same issue arose before this Court, and a writ of certiorari issued to the 9th Circuit, in *Jew Sing* v. *Barber* (348 U. S. 910), the matter became moot by the naturalization of the petitioner, and further proceedings terminated, 350 U. S. 898. Petitioners fear that if the case presently pending to review the decision of the 9th Circuit should in some manner be disposed of not on the merits, and a writ of certiorari were not sought in the instant case, petitioners would be bound by the decision of the Court of Appeals for the 2nd Circuit in the instant case; and in any event, pending decision in *Leng May Ma* v. *Barber*, the respondent would be free to deport the petitioners herein.

Further, there now exists a conflict between the circuits, in that the Court of Appeals for the 9th Circuit and for the 2nd Circuit are in agreement on the issue presented in this case, whereas the Court of Appeals for the District of Columbia Circuit on June 27, 1957, has applied a directly contrary interpretation, *Quan et al.* v. *Brownell*, 248 F. 2d 89.

Further, the issues in this case involve not only the instant parties, but numbers of other persons paroled into the United States who are from the so-called Iron Curtain countries, including in excess of twenty thousand Hungarian refugees admitted to the United States under Execu-

tive Order pursuant to the same parole provisions of the statute whereby the pettiioners in the instant case were paroled into the United States.

Respectfully submitted,

ELMER FRIED,
Attorney for Petitioners,
37 Wall Street,
New York 5, N. Y.

APPENDIX

(Opinions of United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

———o———

No. 316—October Term, 1956.

(Argued June 10, 1957 Decided July 5, 1957.)

Docket No. 24246

———o———

DONG WING OTT and DONG WING HAN,

Plaintiffs-Appellants,

—v.—

EDWARD J. SHAUGHNESSY, District Director of the New York District of the Immigration and Naturalization Service,

Defendant-Respondent.

———o———

Before:

CLARK, *Chief Judge*, and

CHASE and HINCKS, *Circuit Judges.*

———o———

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge.*

Dong Wing Ott and Dong Wing Han appeal from the denial of an injunction for stay of deportation on their claim for discretionary relief under §243(h) of the Immigration and Nationality Act of 1952, 8 U. S. C. §1253(h).

See also *U. S. ex rel. Dong Wing Ott* v. *Shaughnessy*, 2 Cir., 220 F. 2d 537, affirming D. C. S. D. N. Y., 116 F. Supp. 745, certiorari denied 350 U.S. 847.

———o———

ELMER FRIED, New York City, *for plaintiffs-appellants.*

ROY BABITT, Sp. Asst. U. S. Atty. and Gen. Atty., Immigration and Naturalization Service, New York City (Paul W. Williams, U. S. Atty., S. D. N. Y., Charles J. Hartenstine, Jr., Sp. Asst. U. S. Atty, and Harold J. Raby, Asst. U. S. Atty., New York City, on the brief), *for defendant-respondent.*

———o———

PER CURIAM:

Affirmed on the opinion of District Judge Murphy below, D. C. S. D. N. Y., 142 F. Supp. 379; and see also *Leng May Ma* v. *Barber*, 9 Cir., 241 F. 2d 85, certiorari granted —— U. S. ——, June 3, 1957.

DONG WING OTT and DONG WING HAN,
Plaintiffs-Appellants,

v.

EDWARD J. SHAUGHNESSY, District Director of the New York York District of the Immigration and Naturalization Service, Defendant-Respondent.

No. 316, Docket 24246.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Submitted Aug. 2, 1957.

Decided Sept. 11, 1957.

Action by two excluded Chinese natives for declaratory judgment and injunction compelling District Director of Immigration and Naturalization Service to receive and consider their application for stay of deportation to China. The District Court of New York, Thomas F. Murphy, J., 142 F.Supp. 379, dismissed the complaint and plaintiffs appealed. The Court of Appeals, 245 F.2d 875, affirmed. On petition for rehearing, the Court of Appeals held that statutory provision giving Attorney-General discretionary power to suspend deportation of any alien within the United States to any country in which, in his opinion, alien would be subject to physical persecution did not apply to plaintiffs, who were within the country only on parole, which by statute is not regarded as an admission of an alien and when terminated leaves such alien's case to be dealt with in the same manner as any other application for admission to the United States.

Petition for rehearing granted to extent indicated in opinion, and decision reaffirmed.

PER CURIAM:

We granted the rehearing to the extent of receiving briefs from the parties because we wished to consider the impact on this case of Quan v. Brownell, D. C. Cir., — F. 2d —. That decision appears to support the position of the plaintiffs; but while we have been moved to give earnest consideration to it because of our high regard for the tribunal which rendered it, we are constrained to disagree and to continue to follow the Ninth Circuit cases, of which the latest was cited in our opinion.

We think our brothers of the District of Columbia have overlooked the continuing vitality of Kaplan v. Tod, 267 U. S. 228, 45 S. Ct. 257, 69 L. Ed. 585, and cases following it. There it was held that an alien who had been ordered excluded at the time of his attempted entry, but who was released into the United States on parole pending legal proceedings, did not have his status as an excludee affected and the parole did not place him "within the United States" as that phrase is used in the immigration statutes. This distinction between exclusion from entry into the United States because of legal inadmissibility and expulsion under an order of deportation after entry is carefully preserved in the Immigration and Nationality Act of 1952, where Part IV, 8 U. S. C. §§ 1221-1230, contains "Provisions Relating to Entry and Exclusion," while Part V, 8 U. S. C. §§ 1251-1260, deals with "Deportation; Adjustment of Status." Examination of these respective statutes shows a careful differentiation of procedure, see, *e.g.*, 8 U. S. C. § 1226, "Exclusion of aliens—Proceedings," as compared with 8 U. S. C. § 1252, "Apprehension and deportation of aliens—Arrest and custody; review of determination by court."

The provision here in issue giving the Attorney-General certain discretionary power to suspend deportation is found only in Part V, 8 U. S. C. § 1253(h); and in the 1952 revision Congress deliberately inserted the words "within

the United States" in the earlier act (former 8 U. S. C. § 156, as amended in 1950) as though to make clear that it did not apply to excluded aliens. Hence it did not apply to these plaintiffs, only within the country on parole, which by statute "shall not be regarded as an admission of the alien" and when terminated shall leave their case "to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U. S. C. § 1182 (d)(5). We do not regard this precise statutory scheme as destroyed or limited by the occasional use of "deportation" in its more colloquial sense, *e.g.*, 8 U. S. C. § 1226(a), "shall be excluded and deported," or 8 U. S. C. § 1227(a), providing for the immediate "deportation of aliens excluded from admission or entering in violation of law." The word so used serves an obviously different function than in the Part V statutes dealing with deportation in its legal and technical sense.

The petition for rehearing having been granted to the extent indicated, we now reaffirm our decision of July 5, 1957, 2 Cir., 245 F. 2d 875, affirming the decision of the district court, D. C. S. D. N. Y., 142 F. Supp. 379.

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OCTOBER TERM, 1957

DONG WING OTT AND DONG WING HAN, PETITIONERS

v.

JOHN L. MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 655

DONG WING OTT AND DONG WING HAN, PETITIONERS

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JOHN L. MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioners are two Chinese natives who have been ordered excluded from the United States. They applied for a stay of deportation under Section 243 (h) of the Immigration and Nationality Act of 1952 on a claim that they would be subject to persecution if sent back to China. That application was denied on the ground that Section 243 (h) does not apply to excluded aliens (as distinguished from resident aliens ordered deported). Petitioners' action in the United States District Court for the Southern District of New York for declaratory judgment requiring the District Director to receive and consider their applications under Section 243 (h) was dismissed, 142 F.

Supp. 379. The order of dismissal was affirmed by the Second Circuit on appeal, 245 F. 2d 875 (Pet. App. 8), and the decision was affirmed on rehearing on September 11, 1957. 247 F. 2d 769 (Pet. App. 10). The petition for a writ of certiorari, filed December 10, 1957, seeks review of that judgment.

After the petition for a writ of certiorari was filed, the proceedings were held in abeyance in order to afford petitioners an opportunity to apply for continuation of parole under Section 212 (d) (5) of the 1952 Act, under which excluded aliens may, for emergent reasons in the public interest, be permitted to remain in this country. Such applications were made by petitioners and have been denied.

The issue presented by the petition for a writ of certiorari as to the applicability of Section 243 (h) to excluded aliens is the same as that now before this Court in *Leng May Ma* v. *Barber,* No. 105, certiorari granted, June 3, 1957, in which the Court of Appeals for the Ninth Circuit ruled in accord with the decision below (241 F. 2d 85) and *Quan* v. *Rogers,* No. 396, certiorari granted, October 28, 1957, in which the Court of Appeals for the District of Columbia Circuit reached a contrary conclusion (248 F. 2d 89). The respondent therefore does not oppose the grant of a writ of certiorari in this case as well.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

MARCH 1958.

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